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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 289

EDWARD DAVID REED,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

JACK HENRY PARKHURST,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Edward David Reed and Jack Henry Parkhurst, pray that a Writ of Certiorari

issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered on June 12, 1953 [R 242; P 372]* which judgments affirmed the convictions of petitioners for violating Section 12(a) of the Universal Military Training & Service Act, Title 50 U.S.C., App. Section 462(a).

OPINION BELOW.

On the date of the submission of this Petition the opinion of the United States Court of Appeals for the Ninth Circuit was not yet officially reported.

JURISDICTION.

1. The judgments of the Court of Appeals were entered on June 12, 1953 and the Orders denying Petitions for Rehearing were entered on July 27, 1953. [R 243; P 373] The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

2. The bases upon which it is contended that the Supreme Court has jurisdiction herein, and the cases which support such jurisdiction are, in part, as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable

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*The designation "R" followed by the page number is a reference to the Transcript of Record in *Reed v. United States;* the designation "P" followed by the page number is a reference to the Transcript of Record in *Parkhurst v. United States.*

decisions of this Court, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (Rule 38 of the Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U.S. 252, 85 L.Ed. 1313, 61 S.Ct. 866; *Helvering v. Price*, 309 U.S. 409, 60 S.Ct. 673, 84 L.Ed. 836; *National Licorice Co. v. National Labor Relations Board*, 308 U.S. 535, 60 S.Ct. 108, 84 L.Ed. 451; *Lane v. Wilson*, 305 U.S. 591, 59 S.Ct. 249, 83 L.Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (*Postal S.S. Corporation v. El Isleo*, 308 U.S. 378, 60 S.Ct. 332, 84 L.Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo*, 297 U.S. 530, 56 S.Ct. 580, 80 L.Ed. 844; *Le Tulle v. Scofield*, 308 U.S. 531, 60 S.Ct. 75, 84 L.Ed. 447; McNabb v. United States, 318 U.S. 332, 87 L.Ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented, or on other grounds similar to those covered by

the rule. (*Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 62 S.Ct. 966, 86 L.Ed. 1336; *Williams v. Jacksonville Terminal Company*, 314 U.S. 590, 62 S.Ct. 64, 86 L.Ed. 476; *National Labor Relations Board v. Express Publishing Company*, 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930; *Sprague v. Ticonic National Bank*, 306 U.S. 623, 59 S.Ct. 463, 83 L.Ed. 1028.)

(e) A writ of certiorari will issue where important constitutional questions are involved. (*Glasser v. United States*, 315 U.S. 60.)

STATEMENT OF MATTERS INVOLVED.

Edward David Reed and Jack Henry Parkhurst are members and student ministers of Christ's Church of The Golden Rule. They entered the Church, together with their parents and family in 1944, the year of the Church's foundation. (R 151, 168, 178; P 163, 206, 207.) Petitioner Reed was then fifteen years of age, and petitioner Parkhurst was seventeen. (Govt. Exhibit No. 2)

Since that time they have devoted themselves exclusively to the task of preparing themselves for their Church's ministry. This has been a full time undertaking with no compensation, save that gained by "giving to the world a better concept of Christ Jesus' teachings." (R 157, 168, 169, 177; P 206, 218)

The basic purpose of the Church was to illustrate and establish "the practicability of Christ's teachings,

a working model, so that the world could see and understand the practical nature of His teachings," and to show that His teachings constituted "a way of life, not just a way of words." (P 158)

Christ's Church of The Golden Rule is just over eight years old, and has a membership of between 600 and 650 persons. There are approximately 20 or 25 members between the ages of 18 and 26. (P 163) Since the formation of the Church in 1944 there have been no new enrollments or admissions as student ministers of young men of draft age, i.e. between the ages of 18 and 26. (P 201)

The Church maintained a theological seminary in which petitioners Reed and Parkhurst were enrolled. (R 147; Govt. Exhibit No. 1) The basic purpose of the Church was reflected in the nature of the training program for its student ministers. The main emphasis of the training was upon *practical* demonstrations of the application of The Golden Rule in every day life—to make it possible for the student ministers to take their teachings into any walk of life and practice them in their daily associations with each other. (R 155, 156; P 158, 159, 161, 210) Thus, at various student minister training projects in the State of California the student ministers applied their teachings while co-operating in the operation of church-owned and managed activities such as ceramics groups, dairies, sawmills, laundries, and the like. (P 161, 162) All funds received from those activities are placed in a common treasury and used to further the propagation of the Church's ministry.

(R 162) In addition, the course of study included daily morning devotional services, the writing and preaching of sermons, inspirational meetings, hymn services, and the like. These were participated in by the student ministers at the same training projects where the practical application phase of their studies was performed. (R 161, 169 to 173; P 208 to 214)

Petitioners Reed and Parkhurst were performing this theological training when they registered under the Universal Military Training Act and in their classification questionnaires applied for exemption in Class IV-D as student ministers. (Govt. Exhibit Nos. 1 and 2; R 168 to 173; P 207 to 214) On August 8, 1949, petitioner Parkhurst was classified IV-D by Local Board No. 38, and on August 14, 1950, petitioner Reed received a classification of IV-D by Local Board No. 36. (P 40; R 27)

On July 2, 1951, petitioner Reed, after a personal hearing by his draft board, was reclassified I-A. On July 16, 1951, without any hearing by his board, petitioner Parkhurst was reclassified I-A. (R 28; P 42)

Petitioner Reed appeared again before his local board on July 23, 1951, and was continued in class I-A. (R 38, 39) The appeal board affirmed his classification on August 30, 1951. (R 66) He was ordered to report for induction on February 1, 1952 (R 66) and did so, but refused to take the step forward at the end of the induction ceremonies. (R 88) He was indicted on April 2, 1952, for violating Section 12(a) of the Universal Military Training & Service Act, and

was brought to trial on May 19, 1952, before District Judge Edward P. Murphy. (R 3, 7)

Petitioner Parkhurst requested his first hearing before Local Board 38 on July 25, 1951. (P 43) On August 6, 1951, and prior to any personal hearing, the board reclassified him from I-A to III-A, on the evidence of his marriage to a fellow student minister, Etola May Reed, on September 12, 1949. (P 45, 206-207) Petitioner Parkhurst appeared before his draft board for the first time on September 11, 1951, to request the reinstatement of his IV-D classification. (P 48, 49, 51) He was retained in III-A. The Appeal Board, on October 25, 1951, reclassified him I-A. (P 90) He was ordered to report for induction on February 5, 1952. (P 99) He complied with the induction requirements to the point of taking the step forward, and at that point refused to be inducted in the Armed Services. (P 113) He was indicted on April 2, 1952, and brought to trial on June 16, 1952, before District Judge Edward P. Murphy. (P 3, 7)

During the trial petitioner Parkhurst testified he had not had a fair or impartial hearing before the local board. (P 216) He stated that his classification had been changed from IV-D to I-A with no change in his fact circumstances, that the board had stated his church was not really a church, that his answers were taken as a joke by the board members, who received the information about his church's program with "nods and smirks". (P 216, 217) This was denied by the chairman of the local board, called as a rebuttal witness by the Government. (P 289, 290)

During the trials of both petitioners the defense sought, through representatives of the Catholic Church, Local Draft Board Members, the Director of Selective Service for the State of California, and pertinent memoranda and reports, to introduce evidence of Selective Service practice and policy (including evidence of Congressional intent) concerning the exemption of lay brothers of the Catholic Church. Such evidence would have established that the regular practice and policy of the Selective Service System was to classify as "ministerial activities" in the case of lay brothers the type of activities which petitioners performed as student ministers of Christ's Church of The Golden Rule. (R 107 to 115; R 117 to 133; R 138 to 142; R 142 to 145; P 21 to 24; P 129 to 135; P. 137 to 144; P 149, 150; P 151 to 155)

Local Board 38 received no additional facts between the date of petitioner Parkhurst's original classification in IV-D (August, 1949) and his declassification to I-A (July, 1951) (P 129) Board Chairman Dooley testified that petitioner Parkhurst's activities were deemed to be secular and not ministerial. (P 298) The board as a whole concluded that the "manual labor" aspect of the training program was a major factor in their decision that petitioner Parkhurst was not entitled to exemption as a student minister. (P 312, 313)

The United States Attorney repeatedly and erroneously referred to the founder of defendant's church, in the presence of the jury during trial and closing argument, as a convicted seditionist who counseled

young men to evade service in the armed forces. There was no evidence on the point anywhere in the record. (P 167 to 170; P Supp. Tr. of Rec. 362, 363)

The United States Attorney accused defense counsel, in the presence of the jury during trial and closing argument, of putting the Catholic Church on trial and appealing to anti-Catholic prejudice. (P 200; P Supp. Tr. of Rec. 355, 356, 357)

The United States Attorney repeatedly asserted that another member of petitioner Parkhurst's Church was already convicted of the same offense petitioner was to be convicted of. There was no evidence on the point anywhere in the record. (P 235)

The United States Attorney charged petitioner Parkhurst with being part of a studied, persistent plan to counsel young men to evade service in the armed forces. There was no evidence on the point anywhere in the record. (P Supp. Tr. of Rec. 351)

The United States Attorney charged defendant with seditious and traitorous activity against the United States. There was no evidence on the point anywhere in the record. (P Supp. Tr. of Rec. 351, 352)

The United States Attorney stated to the jury that if a verdict was returned in favor of petitioner Parkhurst it would mean the Universal Military Training and Service Act could not be law, and such a verdict would constitute the greatest blow to the enforcement of selective service in the history of the act. (P Supp. Tr. of Rec. 363)

During the trial of petitioner Parkhurst the Government sought to secure the names of the advisory board of elders of the Church. A canon law prohibited this without the consent of the persons involved. On objection by defense counsel the Court stated "If he doesn't know who is to ordain him there is something wrong with the organization." (P 251, 252)

The trial court permitted the United States Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction. The court then stated that it was obvious that defendant was evading the question, despite several replies already given. (P 262 to 269)

The trial court permitted the United States Attorney to ask ten (10) times, over objections, if petitioner would go down and be inducted and take noncombatant service. (P 283 to 286)

In all of the above instances the trial court refused to admonish the United States Attorney, or instruct the jury to disregard his remarks, or order a mistrial.

Verdicts of guilty were returned against both petitioners, and each received the heaviest sentence provided by law, five (5) years imprisonment and a fine of $10,000. (R 13, 14; P 13, 14)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment to the United States Constitution, as it relates to a fair and complete hearing for a Selective Service registrant before his local draft board.

2. The Fifth Amendment to the United States Constitution, as it relates to arbitrary and discriminatory classifications given members of one group of registrants when compared with classifications given members of another group similarly situated.

3. The pertinent portions of the Universal Military Training & Service Act and regulations issued thereunder, as set forth in the Appendix, *infra*.

QUESTIONS PRESENTED.

1. Did the trial court err in refusing to admit evidence of Selective Service practice and policy (including evidence of Congressional intent) with respect to the meaning of "ministerial activities" and what constitutes a "recognized divinity school", which evidence would have permitted the Court to decide whether petitioners had been deprived of due process of law?

2. Did the trial court err in refusing to admit evidence of Selective Service practice and policy (including evidence of Congressional intent) with respect to the meaning of "ministerial activities" and what constitutes a "recognized divinity school", and sub-

mitting to the jury with appropriate instructions the resultant question of whether petitioners had been discriminated against in violation of the due process guaranty of the Constitution?

3. In the face of a conflict in the evidence on whether petitioner Parkhurst had received a fair hearing and procedural due process of law by his local board, was it error for the trial court to refuse to submit the question to the jury with appropriate instructions?

4. Was it prejudicial misconduct for the United States Attorney to:

(a) Repeatedly and erroneously refer to the founder of petitioner's Church, in the presence of the jury, during trial and closing argument, as a convicted seditionist who counseled young men to evade service in the armed forces, when there was no evidence on the point anywhere in the record?

(b) Accuse defense counsel, in the presence of the jury, during trial and closing argument, of putting the Catholic Church on trial and appealing to anti-Catholic prejudice?

(c) Repeatedly assert that another member of petitioner's Church was already convicted of the same offense petitioner was to be convicted of, when there was no evidence on the point anywhere in the record?

(d) Charge petitioner with being part of a studied, persistent plan to counsel young men to evade service in the armed forces, when there was no evidence on the point anywhere in the record?

(e) Charge petitioner with seditious and traitorous activity against the United States, when there was no evidence on the point anywhere in the record?

(f) State to the jury that if a verdict is returned in favor of petitioner it would mean the Universal Military Training and Service Act could not be law, and such a verdict would constitute the greatest blow to the enforcement of selective service in the history of the Act?

5. Did the Court abuse its discretion and commit prejudicial misconduct by:

(a) Stating during the trial of petitioner Parkhurst, in the presence of the jury, "If he doesn't know who is to ordain him there is something wrong with the organization."?

(b) Stating that it was obvious that petitioner was evading the question, after permitting the U. S. Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction?

(c) Permitting the U. S. Attorney to ask ten (10) times, over objections, if the petitioner would go down and be inducted and take non-combatant service?

(d) Failing to admonish the U. S. Attorney and instruct the jury to disregard his remarks, and failing to order a mistrial for the prejudicial misconduct of the U. S. Attorney described in the previous section (4 (a), (b), (c), (d), (e) (f))?

6. Did the Court err in denying petitioners' motions for judgments of acquittal for the reason that

there was no basis in fact for petitioners' classifications of I-A?

REASONS FOR ALLOWANCE OF WRIT.

A Writ of Certiorari should be issued to review the judgment of the Court of Appeals for the Ninth Circuit for each of the following reasons:

1. The decision of the court below is in conflict with the decisions of this Court in the following cases where similar issues were involved:

Cox v. United States, 332 U.S. 442;

Estep v. United States, 327 U.S. 114;

Harrison v. Northern Trust Co., 317 U.S. 476;

United States v. Dickerson, 310 U.S. 554, 562;

United States v. American Trucking Assns., 310 U.S. 534, 543;

N. Y. Central R. Co. v. Edward H. Johnson, 279 U.S. 310, 318;

Brasfield v. United States, 272 U.S. 448, 450.

2. The decision of the Court below is in conflict with the following decisions of other circuit courts of appeal where similar issues were involved:

Niznik v. United States (C.A. 6th Cir. 1949), 173 F. (2d) 328;

United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. (2d) 90.

3. The issues are of grave public importance in that constitutional rights affecting the public are here involved.

CONCLUSION.

For the reasons stated above petitioners pray that their petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
August 24, 1953.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW AND JURISDICTION.

The opinion below was not yet officially reported at the time of the submission of this Petition. The bases of this Court's jurisdiction are set forth in the Petition for Writ of Certiorari.

SPECIFICATION OF ERRORS.

1. The Court below erred in rejecting evidence offered by appellants respecting Selective Service practice and policy (including evidence of Congressional intent) on the point of what constituted a "recognized divinity school" and "ministerial activities" sufficient to exempt a registrant from military service. Such evidence would have established an unfair discrimination against appellants in violation of due process of law. The substance of the rejected evidence is as follows:

(a) Opinion No. 14 of the Director of Selective Service, embodied in State Director Advice 213(b); Second Report of the Director of Selective Service, pages 240-241; Local Board Memoranda of Selective Service System. (R 122-127; P 140-144). These documents would have demonstrated the liberal intent of Congress and the practice and policy of the Selective Service System in characterizing "ministerial activities", and defining a "recognized divinity school" in connection with exemptions afforded ministers of religion and theological students.

(b) Testimony from two Catholic Church officials, local board members, and the Director of Selective Service for the State of California, establishing the regular practice and policy of the Selective Service System to exempt lay brothers of the Catholic Church, and characterizing as "ministerial activities" those labeled "secular" for petitioners. (R 107 to 115; R 138

to 142; R 142 to 145; P 21 to 24; P 129 to 135; P 149, 150; P 151 to 155)

2. The Court below erred in refusing to submit to the jury the question whether petitioners had been arbitrarily and unfairly discriminated against in violation of due process of law, and in refusing to instruct the jury as follows:

"If you determine that the defendant, Jack Parkhurst, has been deprived of due process of law as the result of an arbitrary and discriminatory classification by his local draft board, then it is your duty to acquit the defendant of the offense charged." (Defendant's Requested Instruction No. 6; P 328)

"I instruct you that the decisions of the local boards are final only if they are made in conformity with the Universal Military Training and Service Act and the Regulations issued under the Act. The Regulations limit and define the jurisdiction of the boards, and when a board's action is the result of prejudice, and its classification arbitrary or based on discrimination, then the conduct of the board is lawless and beyond its jurisdiction. An order to report for induction under these circumstances would be void and of no effect." (Defendant's Requested Instruction No. 13; P 329)

"If you find from the evidence the local board classified the defendant I-A because of his religious beliefs or membership in Christ's Church of The Golden Rule, you must acquit the defendant and return a verdict of not guilty." (Defendant's Requested Instruction No. 23; P 329)

"I instruct you that if you find the refusal of the local board to exempt the defendant as a student minister, and his selection and classification in Class I-A, was not done in an impartial manner, then such classification was void and beyond the jurisdiction of the local board, and you must return a verdict of not guilty in favor of the defendant." (Defendant's Requested Instruction No. 25; P 330)

"Each registrant under the Universal Military Training and Service Act is entitled to equal justice under the law. If you find that the policy or practice of classifying ministers or student ministers in Class IV-D has been followed in the case of registrants from another religious group or groups in the same or similar circumstances as the defendant, but has not been followed in the case of defendant, I instruct you such action is contrary to Selective Service Regulations and the due process of law guaranteed by our Constitution. In these circumstances, defendant is entitled to be acquitted by your verdict of not guilty." (Defendant's Requested Instruction No. 28-A; P 330)

"If you find that the policy or practice of the Selective Service System, with respect to other religious organizations, has been to classify as ministerial activities the activities performed by the defendant in his ministerial training program, and that Local Board 38 acted in violation of this policy or practice in classifying the defendant, then you are instructed that such action is contrary to the due process of law guaranteed by our Constitution. In these circumstances the defendant is entitled to your verdict of not guilty."

(Defendant's Requested Instruction No. 32; P 330).

It was further error for the court to give the following instructions requested by the United States Attorney:

"I instruct you that you are not to decide whether the Local Board acted properly or improperly in classifying the defendant in Class I-A or Class III-A.

"I instruct you further that you are not to decide whether the Appeal Board acted properly or improperly in classifying the defendant in Class I-A. . . ." (Plaintiff's Instruction No. 7; P 330)

3. It was error for the court below, in the face of a conflict of evidence, to refuse to submit to the jury the question of whether petitioner Parkhurst had received a fair hearing and procedural due process of law by his local draft board, and to refuse to charge the jury as follows:

"I instruct you that if you find as a fact that the defendant Jack Henry Parkhurst was deprived of a fair hearing before Local Board No. 38, then due process of law, as guaranteed by our Constitution, has not been afforded him, and the order of the Draft Board is therefore null and void. In this event, I instruct you that you must return a verdict of not guilty for the defendant" (Defendant's Requested Instruction No. 30; P. 330)

"Every registrant is entitled to a fair and impartial hearing before the local board considering

his case. If you find from the evidence that any action or statement by the local board reflected a prejudice or a bias against the defendant so as to prevent him from receiving a fair hearing, you are instructed that the local board's classification was null and void. In such a circumstance defendant's constitutional right to due process of law has been violated, and you must return a verdict of not guilty." (Defendant's Requested Instruction No. 31; P 330)

It was further error for the court to give the following instruction requested by the United States Attorney:

> "I instruct you that the defendant was given a full and fair hearing by the Local Board and likewise given a full and fair hearing by the Appeal Board in accordance with the provisions of the Act and the rules and regulations made pursuant thereto." . . . (Plaintiff's Instruction No. 14; P 331)

4. It was misconduct for the United States Attorney, without any evidence in the record to support his charges, nor with any relevancy to issues being tried, to refer repeatedly to the founder of petitioner's Church as a convicted seditionist; to charge petitioner Parkhurst with being part of a studied plan to evade service in the armed forces and with committing seditious and traitorous activity against the United States; to accuse defense counsel of putting the Catholic Church on trial and appealing to anti-Catholic prejudice; and to tell the jury that a verdict for petitioner would be the greatest blow to

the enforcement of the selective service act in its entire history.

5. The trial court abused its discretion and committed error in refusing to take any action to admonish the United States Attorney, or to correct the results of the misconduct described in the preceding section 4; in stating "If he doesn't know who is to ordain him there is something wrong" with petitioner's church; in permitting the U. S. Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction; in permitting the U. S. Attorney to ask ten (10) times, over objections, if defendant would go down and be inducted and take non-combatant service.

6. The Court erred in denying petitioners' Motions for Judgment of Acquittal for the reason that there was no basis in fact for the classification of I-A given petitioners.

ARGUMENT.

I. THE COURT ERRED IN REJECTING EVIDENCE RELATING TO SELECTIVE SERVICE PRACTICE AND POLICY (INCLUDING EVIDENCE OF CONGRESSIONAL INTENT) ON THE POINT OF WHAT CONSTITUTED "MINISTERIAL ACTIVITIES" SUFFICIENT TO EXEMPT A REGISTRANT FROM MILITARY SERVICE.

The defense in both of the instant cases sought to establish that the activities performed by petitioners in the "application" phase of their theological training were "ministerial activities" within the intent of

Congress and according to the settled practice and policy of the Selective Service System. Whether such activities were to be deemed "ministerial" or "secular" was a vital factor in determining their Selective Service Classifications.

The Universal Military Training and Service Act required them to be students preparing for the ministry and "pursuing full time course of instruction in recognized theological or divinity schools" in order to be exempt from military service. (Section 6(g), 62 Stat. 604, as amended by act of June 19, 1951). The meaning of "full time course of instruction" and "recognized" theological or divinity schools is patently ambiguous and unclear.

The testimony at the trial demonstrated that the application period of petitioners' ministerial training occupied the major part of their course of instruction. It was the most important part. (R 155, 156; P 161) Yet the draft boards considered this activity secular and not ministerial, mere "manual labor". Board Chairman Dooley testified this aspect of the Church's training program was a major factor in their decision that petitioner Parkhurst was not entitled to exemption as a student minister. (P 298, P 312, 313)

Testimony of several Catholic church officials, the Director of Selective Service for the State of California, a local board member, and a report and opinion of the National Director of Selective Service, General Hershey, all excluded by the Court, would have demonstrated that essentially identical activities

performed by the lay brothers of the Catholic Church were characterized, pursuant to the liberal intent of Congress, as "ministerial activities" in regularly exempting the lay brothers as "ministers of religion". This was not done in the cases at bar. It was petitioners' position, accordingly, that the local boards had violated petitioners' guaranty against arbitrary and discriminatory classification contained in the Fifth Amendment.

The practice of exempting the lay brothers was a reflection of the rule of liberal construction which appeared in the enactment and administration of the first of the Selective Service Acts, in 1940, and which has continued, by congressional acquiescence in the administrative interpretation of the succeeding Acts of 1948 and 1951, to the present day. In determining what activities were to be labeled "ministerial" Congress made clear that the lay brothers were within the purview of the Statutory exemption.

> Part IV, Opinion No. 14, June 12, 1941, amended November 2, 1942 (incorporated in State Director Advice 213-B) Director of Selective Service General Hershey.

The Director of Selective Service, in referring to the Section of the 1940 Act relating to students preparing for the ministry, stated:

> "The term 'recognition of such schools' means not the approval by educational accrediting agencies, but recognition by a denomination of the school as leading into the ministry of the denomination. It, therefore, included a wide range of

types of institutions and grades of institutions under the term 'theological or divinity school'. The same wide extension of the term 'studying for the ministry' in theological and divinity schools that was applied to the term 'ministers of religion' was followed here. Courses might be as brief as one year or might extend over a period of from eleven to fifteen years."

Selective Service in War Time, Second Report of the Director of Selective Service 1941-42, Gov. Printing Office, 1943, p. 241.

The trial court refused to admit any evidence of Opinion No. 14 of the Report of the Director of Selective Service. (R 122-127; P 140-144)

The Supreme Court, in *Cox v. United States,* 332 U. S. 442, 451, ruled that "Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations."

Petitioners also sought to introduce evidence, through the testimony of several Catholic Church officials, local board members, and the Director of Selective Service for the State of California, that it was the settled practice and policy of the Selective Service System to consider as "ministerial activities" the type of training activities performed by petitioners. This was done regularly in cases involving the lay brothers of the Catholic Church. This was not done in the cases at bar.

The trial court likewise refused to admit any of this evidence, rejecting petitioners' contention that it would establish an arbitrary and discriminatory vio-

lation of Selective Service policy and practice, and hence an abridgment of their due process guarantees. (R 107 to 115; R 138 to 142; R 142 to 145; P 21 to 24; P 129 to 135; P 149, 150; P 151 to 155)

The use of legislative history in the interpretation of statutes, and particularly where the statute contains ambiguities, as in the instant case, has become standard practice in the Federal Courts.

United States v. Dickerson, 310 U.S. 554, 562;
United States v. American Trucking Assns., 310 U.S. 534, 543;
Sparkman, Legislative History and the Interpretation of Laws, 2 Ala. L. Rev. 189 (1950).

The history of the statute since its enactment is frequently a material consideration. The construction of the statute by those charged with its administration, particularly high executive officers, is entitled to great weight. And Congressional acquiescence in the judicial or administrative interpretation of a statute is to be considered evidentiary of the legislative intent at the time of enactment.

Billings v. Truesdell, 321 U.S. 542, 552;
United States v. American Trucking Assn., supra at 549;
Gray v. Powell, 314 U.S. 402;
Kern River Co. v. United States, 257 U.S. 147;
Stout v. Hancock, 146 F. 2d 741;
Carriso, Inc. v. United States, 106 F. 2d 707.

In *Harrison v. Northern Trust Co.,* 317 U.S. 476, it was held reversible error for the lower court to refuse to consider the legislative history of the statutory pro-

vision involved, even though the provision on its face seemed plain and unambiguous.

In *Niznik v. United States* (C. A. 6th Cir., 1949), 173 F. 2d 328, at 336, the court ruled that while the decision in *Cox v. United States,* supra, foreclosed reweighing the evidence considered by the local board, if the board's classification was the result of prejudice or discrimination such material questions of fact should be submitted to the jury to determine if the registrants had been afforded due process of law.

A discriminatory classification, of course, is in violation of Selective Service Regulations and therefore beyond the jurisdiction of the Boards.

Selective Service Regulations Sec. 1622.1(d);
Estep v. United States, 327 U.S. 114.

In its opinion the court below stated, "On his trial each sought to introduce testimony concerning exemptions accorded by selective service boards to lay brothers of the Catholic Church, and each contends that the court erred in refusing to permit the introduction of such testimony for the jury's consideration." [P 367] This statement misconceives petitioners' position.

Petitioners do *not* contend that the error of the trial judge was merely, or solely, in refusing to allow the *jury* to consider the above referenced testimony. Petitioners contend that, minimally, such testimony was proper for the consideration of the *court.* There is nothing in the decision in *Cox v. United States,* 332 U.S. 442, that precludes the *trial court* itself from determining if the Fifth Amendment to the Constitu-

tion was violated by an arbitrary and discriminatory classification.

In the *Cox* case the contention was made that the jury should have been permitted to determine if the defendant was "erroneously" classified, and, also, if he was indeed a minister of religion. The Supreme Court held this would have been improper, that a *jury* could not pass on such issues. (See page 452 of opinion)

The holding in the *Cox* case does not in any way dispose of petitioners' contention that, at the least, the trial court should have admitted and considered the testimony respecting the classifications extended to the lay brothers of the Catholic Church and those given the student ministers of Christ's Church of the Golden Rule. Exclusion of such testimony for *any* purpose was consequently prejudicial error.

Even were one to concede, *arguendo,* that the jury is foreclosed from reviewing a charge of unconstitutional classification in a selective service case, surely the accused is entitled to a decision on this issue by the trial *court.* To hold otherwise is to hold that nowhere in our judicial framework is there a provision for review of an administrative act claimed, by a person accused of a felony, to be violative of due process and unconstitutional.

The court below further misconceived the position taken by petitioners when it stated, "In the *Tyrrell* case, as here, it was contended that the trial court erred in declining to submit to the jury the question whether the defendant's right to freedom of religion

had been violated by the board's determination that the prescribed program of instructions did not constitute theological studies." [P 369]

There has been no contention on petitioners' part that their right to freedom of religion has been violated by an act of the local board. There has been no contention that the jury should have considered such a question.

The First Amendment to the Constitution of the United States, and its guaranty respecting religion, has never been at issue in the instant cases. Petitioners have consistently maintained that the question of whether they have been deprived of due process of law under the *Fifth Amendment* is a proper one for the *court* to determine, as a minimum. Petitioners also contend that where a conflict in the evidence raises a factual question concerning the violation of due process of law the jury may properly determine the issue.

The decision in *Tyrrell v. United States*, 200 F. 2d 8, did not dispose of this question, since the question was never before the court in that case.

II. THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY THE DISPUTED QUESTION OF WHETHER PETITIONER PARKHURST HAD RECEIVED A FAIR HEARING BEFORE HIS LOCAL BOARD.

There was a conflict in the evidence as to whether a fair hearing had been afforded petitioner Parkhurst. He testified that he had not received a fair and

impartial hearing. He stated that his classification had been changed from IV-D to I-A with no change in his fact circumstances, that the board had stated his church was not really a church, that his answers were taken as a joke by the board members, who received the information about his church's program with "nods and smirks". (P 216, 217) This was denied by the chairman of the local board, called as a rebuttal witness by the Government. (P 289, 290)

The law places upon the local board the responsibility for providing the registrant a full and fair hearing. When this is disputed, as was the case in *Niznik v. United States* (C.A. 6th Cir. 1949), 173 F. 2d 328, where the registrant, a Jehovah's witness, adduced facts that indicated his hearing was unfair, the registrant is entitled to have that question resolved by a jury. The court in the *Niznik* case stated, at page 336:

> "It is true that it was decided in the *Cox* case that the decisions of the Local Boards made in conformity with the regulations are final even though they may be erroneous . . . and the Courts are not to weigh the evidence to determine whether the classification made by the Local Board was justified. However, the regulations limit and define the jurisdiction of the Boards, and when a Board's action is the result of prejudice, and its classification based upon discrimination, its conduct is lawless and beyond its jurisdiction.
>
> ". . . *The material questions of fact, as heretofore indicated, should be submitted to the jury under appropriate instructions as to the law, so that it may be determined whether the registrants*

have been afforded due process of law." (Emphasis added)

See also:

United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. 2d 90.

Yet the Court of Appeals for the Ninth Circuit, in its opinion in the instant case, stated as follows:

> "It is contended that the court erred in refusing to submit to the jury the disputed question whether Parkhurst had received a fair hearing before the local board. *We regard that question as properly one for the court,* since it correctly held that there was a basis in fact for the board's classification." [P 370, emphasis added]

This holding is directly *contra* to that of the Court of Appeals for the Sixth Circuit in the *Nicak* case. Whether or not the trial court correctly held there was a basis in fact for the classifications of I-A is not the decisive test. Even though a basis in fact exists for such classifications, every registrant is nonetheless entitled to a fairly conducted personal hearing before his board. If such a hearing is rendered unfair, by reason of bias or prejudice on the part of board members, the mere existence of a bias in fact for this classification does not validate the classification. The registrant should nonetheless secure a reversal of the board's decision, since he is entitled as a matter of right under selective service regulations to a full and fair personal hearing. And where at the trial a conflict in the evidence is produced on this issue the de-

fendant may properly have such conflict resolved by the jury. To conclude otherwise would make a complete nullity of the *Niznik* decision, in so far as it relates to this question.

The appeal board, under existing regulations, always acts without benefit of a personal hearing extended to the registrant. It should be pointed out that the appeal board could not possibly learn from the printed record or summary of the hearing the nature of the actions of the local board members which were prejudicial to petitioner Parkhurst. It cannot be said that its perusal of the written record of the local board supersedes *all* action of the local board. A contrary holding would substitute, in effect, a written record in place of the personal hearing assured all registrants by selective service regulations. Its action in placing the registrant in Class I-A cannot be said to have been an affirmation of the propriety of the personal hearing.

III. THE UNITED STATES ATTORNEY CHARGED MISCONDUCT BY REPEATED REFERENCE TO EXTRANEOUS ISSUES ON WHICH THERE WAS NO EVIDENCE AND WHICH HAD NO RELEVANCE TO THE ISSUES BEING TRIED.

The U.S. Attorney, without any evidence in the record to support his charges, nor with any relevance to issues being tried, referred repeatedly to the founder of petitioner Parkhurst's Church as a convicted seditionist who counseled young men to evade service in the armed forces; charged petitioner with being part

of a studied plan to evade service in the armed forces and with committing seditious and traitorous activity against the United States; accused defense counsel of putting the Catholic Church on trial and appealing to anti-Catholic prejudice; and told the jury that a verdict for petitioner would be the greatest blow to the enforcement of the Selective Service Act in its entire history. (P 167 to 170; P 200; P 235; P Supp. Tr. of Rec. 351, 352, 355 to 357; 362, 363)

Counsel are under a duty to prevent the jury from considering issues on which there is no evidence, and to desist from appeals to passion and prejudice. An omission to discharge this duty, because it makes a trial unfair, is prejudicial error.

Hockaday v. Red Lines, Inc. (D. C.-1949), 174 F. 2d 154.

The *Hockaday* case was an action for personal injuries. Defense counsel had referred in cross-examination and final argument to the failure of plaintiff to serve in the army as a condition for a suspended sentence for assault. The court held this was prejudicial misconduct and granted a new trial to plaintiff. It stated, at page 156:

> "Under our system of jurisprudence . . . it is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation

of it, is a fatal error, because it makes the trial unfair."

Ordinarily prejudicial remarks of counsel call for the direction of a mistrial.

Beck v. Wings Field (C.C.A.3-1941), 122 F. 2d 144.

IV. THE COURT ERRED IN REFUSING TO ADMONISH OR RESTRAIN THE UNITED STATES ATTORNEY IN THE COMMISSION OF HIS MISCONDUCT. THIS, TOGETHER WITH THE COURT'S OWN COMMENTARY ON THE EVIDENCE, WAS AN ABUSE OF DISCRETION.

During the trial of petitioner Parkhurst the Government sought to secure the names of the Advisory Board of Elders of the Church. A canon law prohibited this without the consent of the persons involved. On objection by defense counsel the Court stated "If he doesn't know who is to ordain him there is something wrong with the organization." (P 251, 252)

The trial court permitted the United States Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction. The court then stated that it was obvious that defendant was evading the question, despite several replies already given. (P 262 to 269)

The trial court permitted the United States Attorney to ask ten (10) times, over objections, if petitioner would go down and be inducted and take noncombatant service. (P 283 to 286)

The court, as well as counsel, has the duty to see that every trial is fairly and impartially conducted. It should prevent the jury from considering extraneous issues and guard it against the influence of passion and prejudice.

Union Pac. R. Co. v. Field (C.C.A. 8th-1905), 137 Fed. 14, 15.

The public interest requires that the court, of its own motion, protect suitors in their right to a verdict uninfluenced by appeals to prejudice. It should intervene whenever necessary to insure a fair trial.

Brasfield v. United States, 272 U.S. 448, 450;
Aetna Life Ins. Co. v. Kelley (C.C.A. 8th-1934), 70 Fed. 2d 589.

In *N. Y. Central R. Co. v. Edward H. Johnson,* 279 U.S. 310, at page 318, the court said:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice . . . The failure of counsel to particularize an exception will not preclude this Court from correcting the error."

It is conceded, of course, that where the sole fact issue for the jury's determination has been admitted, misconduct as described above in points III and IV

would not be prejudicial. However, it would be both material and prejudicial in the event of a new trial in which the issue of a fair hearing would be submitted to the jury. In such a circumstance, it is submitted, court and counsel are obligated to assure the defendants an environment free from extravagant, inflammatory, and prejudicial language and conduct.

V. THE COURT ERRED IN DENYING PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL FOR THE REASON THAT THERE WAS NO BASIS IN FACT FOR THE CLASSIFICATION OF I-A GIVEN PETITIONERS.

There was no conflict in either petitioners' Selective Service files or in the record of the trial court respecting the manner in which petitioners' time was occupied. There was no dispute concerning the fact they were preparing for the ministry under the direction of their Church. There was no evidence contradicting the fact that they were satisfactorily pursuing their Church's course of instruction.

In order for the classification of I-A to rest upon *any* basis in fact, they necessarily had to rest upon a conclusion that petitioners were not following "a full-time course of instruction in a recognized theological or divinity school." (Section 6(g), 62 Stat. 604, as amended by Act of June 19, 1951)

Whether a theological school is "recognized" is, of course, not a matter for determination by the draft boards. As the Director of Selective Service said of a comparable phrase in the 1940 Act, "The term 'recog-

nition of such schools' means not the approval by educational accrediting agencies, *but recognition by a denomination of the school as leading into the ministry of the denomination.*" (*Selective Service in Wartime,* Second Report of the Director of Selective Service (1941-42, G.P.O., 1943, p. 241) (Emphasis added)

See also:

Watson v. Jones, 80 U.S. 679, 727.

Whether petitioners were pursuing "a full time course of instruction" turned on the designation given to the application phase of petitioners' training program. And these activities, as set out more fully in Point I of this Argument, have been characterized as "ministerial activities" by Congress and the Selective Service System. Thus, the settled policy and practice of Selective Service administration, as well as Congressional intent in enacting the various Acts, confirm the designation given these activities by petitioners and their Church—viz.: full time instruction in preparation for the ministry of Christ's Church of The Golden Rule.

In view of this, it cannot be said that any basis in fact existed for the classification given petitioners. The motions for judgment of acquittal should have been granted. It was error to deny them.

Estep v. United States, 327 U.S. 114.

CONCLUSION.

For the reasons stated above petitioners pray that their petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
August 24, 1953.

Respectfully submitted,

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(Appendix Follows.)